Supreme Court, U. S.
FILED
APR 3 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1510

IN THE MATTER OF THE BOHACK CORPORATION,
Debtor.

JOSEPH BINDER, A WITNESS,
Petitioner,

v.

OFFICIAL CREDITORS' COMMITTEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAY G. STRUM
425 Park Avenue
New York, New York 10022
(212) 759-8400

Counsel for Petitioner

Of Counsel:

KAREN E. KATZMAN
LOUIS J. MAGGIOTTO, JR.
P. GREGORY SCHWED
Kaye, Scholer, Fierman, Hays
& Handler
425 Park Avenue
New York, New York 10022
(212) 759-8400

April 3, 1979

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision and Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ	10
I. The Court of Appeals Improperly Expanded Section 7b to Include Former Officers, Directors and Stockholders, Thus Improperly Conferring Immunity on Binder and Depriving Him of His Right to Assert His Fifth Amendment Privilege Against Self-Incrimination	12
II. The Failure to Permit the Bankruptcy Judge to Determine Whether Binder Should Be Designated as the Debtor Pursuant to Section 7b Was an Abuse of Discretion	20
Conclusion	24

Table of Authorities

Cases: PAGE

In re Bart, 304 F.2d 631 (D.C. Cir. 1962) 13, 14
Bott v. *American Hydrocarbon Corp.*, 458 F.2d 229 (5th Cir. 1972) ..... 16 & n
In re Bush Terminal Co., 102 F.2d 471 (2d Cir. 1939) 8-11, 15-19
In re Elkins-Dell Mfg. Co., 253 F. Supp. 864 (E.D. Pa. 1966) 22
Far East Conference v. *United States*, 342 U.S. 570 (1952) 22
Federal Maritime Board v. *Isbrandtsen Co.*, 356 U.S. 481 (1958) 22
FTC v. *Sun Oil Co.*, 371 U.S. 505 (1963) 16
In re Fowler, 407 F. Supp. 799 (W.D. Okla. 1975) 22
In re Gottfried Baking Co., 312 F. Supp. 643 (S.D.N.Y. 1970) 22
In re Gowen, 328 F. Supp. 789 (E.D. Mo. 1971) 21
In re Grand Jury Investigation [*Frank*], 317 F. Supp. 792 (E.D. Pa. 1970) 13-14
Greene v. *Harris*, 240 F.2d 275 (2d Cir. 1957) 17-19
In re Ira Haupt & Co., 379 F.2d 884 (2d Cir. 1967) 21
In re Ira Haupt & Co., 287 F. Supp. 318 (S.D.N.Y.), *appeal dismissed per curiam*, 405 F.2d 493 (2d Cir. 1968) 22
Kastigar v. *United States*, 406 U.S. 441 (1972) ..10 & n, 11, 13
In re Naftalin & Co., 315 F. Supp. 463 (D. Minn. 1970) .. 21
In re Nassau Press, Inc., 259 F. Supp. 666 (E.D.N.Y.), *aff'd on other grounds per curiam*, 369 F.2d 700 (2d Cir. 1966) 22
In re Ostrer, 318 F. Supp. 984 (E.D.N.Y. 1970) 23
Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) 22

PAGE

In re Rosenfeld-Goldman Co., 228 F. 921 (D. Mass. 1915) 21
In re Shapiro, 187 F. Supp. 298 (E.D.N.Y. 1958) 22
In re Stirling Homex Corp., Nos. 78-5025, 78-5039, slip op. 371 (2d Cir., Nov. 22, 1978), *affirmed as modified*, slip op. 1243 (2d Cir., Jan. 30, 1979) 23
Ullmann v. *United States*, 350 U.S. 422 (1956) ..10 & n, 11, 13
In re Unikraft Homes of Virginia, Inc., 370 F. Supp. 667 (W.D. Va. 1974) 22
United States v. *Castellana*, 349 F.2d 264 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966) 14
United States v. *Coyne*, 587 F.2d 111 (2d Cir. 1978) ..14, 23-24
United States v. *Weissman*, 219 F.2d 837 (2d Cir. 1955) 17-19
In re Vericker, 446 F.2d 244 (2d Cir. 1971) ..... 13-14, 15 & n
In re Wolman, 459 F.2d 80 (4th Cir. 1972) 22

Statutes:

Bankruptcy Act—

§ 2a(10), 11 U.S.C. § 11(a)(10)(1976) 6, 23
§ 7a, 11 U.S.C. § 25(a)(1976) ..... *passim*
§ 7b, 11 U.S.C. § 25(b)(1976) ..... *passim*
§ 21a, 11 U.S.C. § 44(a)(1976) 4
§ 24c, 11 U.S.C. § 47(c)(1976) 2
§ 158, 11 U.S.C. § 558(1976) 16-17
§ 302, 11 U.S.C. § 702(1976) 5n
Chapter XI, 11 U.S.C. §§ 701-799(1976) 4

Bankruptcy Code—

§ 344, 11 U.S.C.A. § 344(1979) 15n

PAGE

OTHER STATUTES:

28 U.S.C. § 1254(1)(1976) 2

RULES AND REGULATIONS:

Bankruptcy Rule 205, 11 U.S.C. App. Rule 205 (1976) 5

Bankruptcy Rule 901(6), 11 U.S.C. App. Rule 901(6)(1976) 15n

OTHER AUTHORITIES:

U. S. CONST.—

amend. V ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

IN THE MATTER OF THE BOHACK CORPORATION,

Debtor.

JOSEPH BINDER, A WITNESS,

Petitioner,

v.

OFFICIAL CREDITORS' COMMITTEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Joseph Binder respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on January 10, 1979.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, dated January 10, 1979, has not yet been reported officially or unofficially. The opinion of the District Court for the Eastern District of New York, dated May 12, 1978, is not reported officially or unofficially. The opinion of the Bankruptcy Court for the Eastern District of New York, dated February 3, 1978, is not reported officially; it is

reported unofficially at *In re Bohack Corp.*, 4 Bankr. Ct. Dec. 78 (CORP. REORG. REP.) (E.D.N.Y. 1978). The opinions of the court of appeals, the district court, and the bankruptcy court are set forth in the Appendix to this Petition.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was dated and entered on January 10, 1979. A motion to stay the mandate of the court of appeals was made on January 25, 1979 and denied February 13, 1979, Judge Oakes dissenting. The mandate issued February 13, 1979. An application to stay the enforcement of the mandate, order, and judgment of the court of appeals was made to the Honorable Thurgood Marshall, Associate Justice of this Court, on February 15, 1979 and denied February 22, 1979. Both the court of appeals order denying the stay application and the letter from the Supreme Court informing counsel of Justice Marshall's denial of the stay application are set forth in the Appendix hereto. This petition for certiorari was filed within ninety (90) days of the date of the judgment of the court of appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 11 U.S.C. § 47(c).

Questions Presented

1. Did the court of appeals improperly expand Section 7b of the Bankruptcy Act, 11 U.S.C. § 25(b) (1976), to include a former officer, director, and stockholder of the debtor despite the fact that the statute does not refer to former officers, directors, or stockholders, thereby improperly conferring immunity on Joseph Binder and depriving him of his fundamental constitutional right to assert the Fifth Amendment privilege against self-incrimination?

2. Did the order of the district court, affirmed by the court of appeals in a summary opinion, directing the bankruptcy judge to designate a former officer and director of the debtor to perform the duties of the debtor, although the bankruptcy judge had never considered the issue of designation, constitute a wholly unauthorized invasion of the bankruptcy court's discretion which has thereby endangered the fundamental constitutional rights of Joseph Binder and interfered with the orderly and efficient administration of bankruptcy and Chapter XI proceedings?

Constitutional Provision and Statute Involved

The federal statute involved herein is Section 7 of the Bankruptcy Act, 11 U.S.C. § 25 (1976). This statutory section is set forth in the Appendix hereto. It provides in pertinent part:

> "(a) The bankrupt shall . . . (10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge . . . .
>
> "(b) Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees

or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this title."

In addition, the Fifth Amendment to the United States Constitution forms a vital part of the consideration of the merits herein. This constitutional provision is set forth in the Appendix hereto. It provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

Statement of the Case

The relevant facts of the instant case bear a unique relationship to the legal questions now on appeal. As set forth below, this writ is sought in large part because of the departure from the usual and accepted conduct of judicial proceedings by the district court and court of appeals in the course of the instant case resulting in the deprivation of an individual's constitutional rights.

On July 30, 1974, The Bohack Corporation ("Bohack") filed a petition for arrangement pursuant to Chapter XI of the Bankruptcy Act, 11 U.S.C. §§ 701-799 (1976), in the Eastern District of New York [A. 1a, 28a].* Three years after the filing of this petition, the Official Creditors' Committee ("Creditors' Committee") applied to the bankruptcy judge for an order, which was granted, directing Joseph Binder ("Binder") to appear before the bankruptcy judge as a witness—not as the debtor—for an examination pursuant to Section 21a of the Bankruptcy Act, 11 U.S.C.

* Numerical references in brackets and preceded by the letter "A." are to the Joint Appendix on appeal in the Second Circuit, which is part of the record of this case in the possession of the Second Circuit.

§ 44(a) (1976), and Bankruptcy Rule 205, 11 U.S.C. App. Rule 205 (1976) [A. 49a-52a]. (Both Section 21a and Rule 205 are set forth in the Appendix hereto.) The Creditors' Committee did not request, nor did the bankruptcy judge order, that Binder testify as the debtor* pursuant to Section 7a(10) of the Bankruptcy Act, 11 U.S.C. § 25(a)(10) [A. 49a-52a].

At the time the examination was ordered, Mr. Binder had not been affiliated with Bohack as either an officer or director *for more than one year* [A. 301a]. At the present time, Mr. Binder is neither an officer, director, nor stockholder of Bohack. On August 9, 1977 and February 24, 1978, Mr. Binder appeared as a witness before the bankruptcy judge, C. Albert Parente. Mr. Binder declined to answer each of the questions put to him at the two examinations, asserting his rights under the Fifth Amendment [A. 122a, 139a *passim*].

On both dates when Mr. Binder asserted his Fifth Amendment right, neither the bankruptcy judge nor counsel for the Creditors' Committee suggested that Mr. Binder should be compelled to testify under a grant of immunity under Section 7a(10) or that Mr. Binder should be designated to perform the duties of the debtor pursuant to Section 7b of the Bankruptcy Act, and then be examined under Section 7a thereby receiving the immunity which may be conferred under that section. To the contrary, Judge Parente acknowledged Mr. Binder's right to assert his Fifth Amendment privilege, and, construing the scope of the privilege, sustained that assertion in numerous instances [A. 124a, 148a-49a *passim*].

* Section 302 of the Bankruptcy Act, 11 U.S.C. § 702 (1976), provides that in a Chapter XI proceeding, "provisions relating to 'bankrupts' [in Chapters I-VII] shall be deemed to relate also to 'debtors' . . . ." This statutory section is set forth in the Appendix hereto.

Mr. Binder appealed from Judge Parente's orders requiring him to answer, and the Creditors' Committee appealed from the orders allowing Mr. Binder to refuse to answer certain questions. The appeal was limited to a review of the scope of Mr. Binder's Fifth Amendment privilege against self-incrimination [A. 248a-51a].*

Briefs were submitted to the District Court for the Eastern District of New York on the Fifth Amendment issue. The district court is the reviewing court of first instance in a bankruptcy proceeding. 11 U.S.C. § 11(a)(10) (1976). At the argument before the district court, the court unexpectedly asserted that the witness was required to answer all questions because he had immunity pursuant to Section 7 of the Bankruptcy Act (5a).** (The transcript of this argument is set forth in the Appendix hereto.) Counsel for the witness was taken by surprise because neither the bankruptcy judge nor counsel for the Creditors' Committee had ever previously asserted that the witness had been examined as the bankrupt under Section 7 of the Bankruptcy Act, and was thereby entitled to the immunity provided by that section.

Counsel for the witness requested an opportunity to submit a brief on this issue raised sua sponte by the district court (5a-6a). The district court inquired as to how long counsel for the witness wanted to prepare a brief, and the following colloquy ensued:

---

* Following the August 9, 1977 examination, the Fifth Amendment issue was briefed before the bankruptcy judge. In a February 3, 1978 opinion, the bankruptcy judge ordered Mr. Binder to appear to answer the previously posed question and resume his examination. Mr. Binder's appeal from the February 3, 1978 opinion was consolidated with his appeal and the appeal of the Creditors' Committee from Judge Parente's oral orders at the February 24, 1978 examination. The February 3, 1978 opinion appears in the Appendix to this Petition.

** Parenthetical numerical references followed by the letter "a" are to pages of the Appendix to this Petition.

"MR. STRUM: I think two weeks would be sufficient.

"THE COURT: Oh, of course it would be. I put it on today because we are not going to delay the Bohack Bankruptcy by long delays. You can research this in 24 hours.

"MR. STRUM: The reason it has not been briefed before is because the issue was not raised by anybody heretofore.

"THE COURT: Have your brief in Friday by 4 o'clock. I am not going to spend a lot of time on this unless you are going to tell me something I have not heard before.

"You say the statute does not give you transactional immunity so you can still assert the privilege. Narrow issue.

"MR. STRUM: I'd like to look at the cases on that, your Honor.

"THE COURT: Start with Castigar.

"MR. STRUM: All right.

"THE COURT: Castigar against the United States, 406, U.S. 441, 192, Supreme Court, 1653, 1972 decision.

"You might also look at U.S. against Dorneau, 491 F.2d, 473, Second Circuit case, 1974.

"The statute immunizes you against prosecution in the manner in which the Supreme Court says you are immunized. Then you have no right to withhold testimony. If it does not you may very well have the right to withhold it." (6a-7a).

Thus having raised an issue not theretofore perceived by either party, having formed an opinion as to the resolution of that issue, and asserting a need for haste, the district court gave the witness's counsel two days to write a brief. It is not readily apparent why such haste was required in a case wherein the witness's constitutional rights are at

stake, where the Chapter XI petition had been filed almost four years previously (on July 30, 1974) and where no attempt had been made to obtain the witness's testimony until the spring of 1977, almost three years after the filing of that petition.

In any event, both sides submitted briefs prior to the deadline set by the district court. Binder's brief argued that in the case of a corporate debtor, only a person designated to perform the duties of the bankrupt could be examined under Section 7 of the Bankruptcy Act and receive the immunity contained therein, and that the bankruptcy court had not so designated Binder nor could it do so under the leading Second Circuit case on the subject, *In re Bush Terminal Co.*, 102 F.2d 471 (2d Cir. 1939).

In its Memorandum of Decision and Order entered on May 12, 1978, the district court declined to decide the appeals that had been taken by the witness and by the Creditors' Committee (9a-16a). Instead, the court remanded the proceeding to the bankruptcy judge, directing Judge Parente to designate Mr. Binder to perform the duties of the bankrupt under Section 7b. Further, the court ordered Mr. Binder, once designated, to answer all the questions propounded at the August 9, 1977 and February 24, 1978 examinations (16a). The district court's decision recognized that its view, expressed sua sponte at the oral argument and prior to the submission of the supplemental briefs, that Binder was *at the time of his examinations* cloaked with immunity and required to testify, was incorrect, in that the witness had not been designated under Section 7b and thereby could not receive immunity under Section 7.

Binder appealed to the Court of Appeals for the Second Circuit from the district court's order on two grounds.

Binder argued that the district court had abused its discretion by ordering the bankruptcy judge—the individual with primary responsibility for administering the bankrupt's estate—to designate Binder to perform the duties of the debtor pursuant to Section 7b of the Bankruptcy Act. Binder further argued that the bankruptcy judge cannot as a matter of law designate Binder, pursuant to Section 7b of the Bankruptcy Act, to perform now—four years after Bohack's Chapter XI petition was filed—the duties of the debtor when Mr. Binder is no longer an officer, director, or stockholder of Bohack and when such designation is solely for the purpose of requiring Mr. Binder to relinquish his previously asserted Fifth Amendment rights and compelling him to testify under a grant of immunity under Section 7a(10) of the Bankruptcy Act.* Binder argued that such designation would be inconsistent with the language of Section 7b and the long-standing rule expressed in the leading Second Circuit case of *In re Bush Terminal Co.*, 102 F.2d 471 (2d Cir. 1939), which prohibited the designation of a former officer, director, or stockholder to perform the duties of the debtor pursuant to Section 7b.

On January 10, 1979, the court of appeals, in a summary two-paragraph opinion which made no reference to the *Bush Terminal* decision, affirmed the order of the district court. The court found that the district court did not lack authority to order the bankruptcy judge to designate Binder pursuant to Section 7b. Further, without reference to the *Bush Terminal* case or the language of Section 7b of the Bankruptcy Act, and citing only two cases, neither apposite, the court held that it was proper to des-

* A third issue—whether Binder, having properly invoked his Fifth Amendment privilege, should be compelled to answer the questions posed to him in the bankruptcy court—was also briefed in the Second Circuit. That issue is not presently before this Court.

ignate Binder pursuant to Section 7b of the Bankruptcy Act, even though he was no longer an officer of Bohack at the time of the district court's decision (17a-18a). Thus, by its holding the court of appeals chose to overrule sub silentio the *Bush Terminal* case.

Reasons for Granting the Writ

The decision below endangers the assertion of fundamental constitutional rights by Joseph Binder. The importance of the Fifth Amendment as a fundamental individual constitutional right was recently expressed by this Court in *Kastigar* v. *United States,* 406 U.S. 441, 444-45 (1972):

> "The [Fifth Amendment] privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. *This Court has been zealous to safeguard the values that underlie the privilege.*" (footnotes omitted; emphasis added).

In an earlier opinion, *Ullmann* v. *United States,* 350 U.S. 422 (1956),* the Court stated:

> "This command of the Fifth Amendment . . . [is] 'one of the great landmarks in man's struggle to make himself civilized.' Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. *This constitutional protection must not be interpreted in a hostile or niggardly spirit.*" 350 U.S. at 426 (footnote omitted; emphasis added).

* Both *Kastigar* and *Ullmann* held that the grants of immunity expressly authorized by the statutes in question could constitutionally replace a witness's right to assert the Fifth Amendment.

The importance of the values of the Fifth Amendment privilege strongly affirmed in *Kastigar* and *Ullmann* requires that an immunity statute be strictly construed to insure those values are maintained. The improper grant of immunity is tantamount to the denial of the Fifth Amendment right against self-incrimination.

In this case, the grant of immunity has been improperly conferred as a result of an unjustified expansion of Section 7b of the Bankruptcy Act and an unwarranted interference by the district court with the proper functioning of the bankruptcy court. In its summary decision, the court of appeals sub silentio overruled a decision of the Second Circuit which had stood as the law of that circuit for forty years. In so overruling *Bush Terminal,* the court expanded Section 7b of the Bankruptcy Act by holding that a former officer, director, or stockholder can be designated, notwithstanding the unequivocal language of the statutory section.

Thus, a review by this Court of the improper expansion of Section 7b of the Bankruptcy Act is imperative to insure that this Court continues its "zealous" safeguarding of the values that underlie the Fifth Amendment privilege.

I.

The Court of Appeals Improperly Expanded Section 7b to Include Former Officers, Directors and Stockholders, Thus Improperly Conferring Immunity on Binder and Depriving Him of His Right to Assert His Fifth Amendment Privilege Against Self-Incrimination.

The importance of this case stems from the court of appeals' unprecedented expansion of the scope of Section 7b of the Bankruptcy Act and the consequent invasion of individual constitutional rights as the result of such expansion of the express statutory command of Section 7b.

In the instant case, the court of appeals improperly interpreted Section 7b by holding that a former officer, director, and stockholder of the debtor can be designated to perform the duties of the debtor even though the section makes no reference to former holders of the designated positions. Section 7b reads:

> "Where the bankrupt is a corporation, *its officers, the members of its board of directors* or trustees or other similar controlling bodies, *its stockholders* or members, or such of them as may be designated by the court *shall perform the duties imposed upon the bankrupt by this title.*" (emphasis added).

Clearly from the face of the statute, only officers, directors, or stockholders may be required to perform the duties of the bankrupt or debtor—*i.e.*, only *present* officers, directors, or stockholders. Had Congress intended to include former officers, directors, or stockholders, the section would so state.

The importance of the Fifth Amendment privilege requires that immunity statutes, such as Section 7a(10) (and

concomitantly Section 7b), be strictly construed. *In re Vericker*, 446 F.2d 244 (2d Cir. 1971); *In re Bart*, 304 F.2d 631 (D.C. Cir. 1962); *In re Grand Jury Investigation* [*Frank*], 317 F. Supp. 792 (E.D. Pa. 1970). These cases express the traditional judicial concern over the abuse of immunity laws. The thrust of these cases—squarely in line with this Court's concern for Fifth Amendment values expressed in *Kastigar* and *Ullmann*—is the absolute necessity of limiting the scope of immunity statutes in order to protect against "'[*t*]*he essential and inherent cruelty of compelling a man to expose his own guilt,*' [citation omitted] even though no criminal punishment can result therefrom, save when Congress had made a policy decision that the public interest so required." *In re Vericker*, 446 F.2d at 247 (emphasis added).

The courts have found that immunity statutes require strict construction for a twofold reason. On the one hand, immunity from prosecution in lieu of constitutional privilege is so important a matter that "[o]nly the strongest circumstances can justify compelling a confession of crime." *In re Bart*, 304 F.2d at 635. On the other hand, Congress in passing immunity statutes has the intent of protecting the public from "wholesale 'immunity baths,'" *Id.* at 634, and from an immunity statute becoming "'a loophole for the escape from punishment for the guilty,'" *In re Vericker*, 446 F.2d at 247 n.3.

In the instant bankruptcy case, the inescapable logical progression of the court of appeals' decision is that *anyone* who *ever* held a responsible position in a corporation may be designated and given immunity. Consequently, Section 7b will have been changed to a new meaning without congressional action; immunity, a tool for gaining needed evidence which should be used only sparingly, may well be conferred indiscriminately; and the concept of a "bankrupt" or "debtor" will lose all meaning.

Moreover, an additional invidious effect of this judge-made law will be that individuals may thrust themselves upon the court as the bankrupt in order to obtain immunity. In both *United States* v. *Castellana,* 349 F.2d 264, 273-74 (2d Cir. 1965), *cert. denied,* 383 U.S. 928 (1966), and *United States* v. *Coyne,* 587 F.2d 111, 118-20 (2d Cir. 1978), the Second Circuit expressed its concern that not every officer be given immunity. As the court said in *Coyne,* not "any officer is free to press his testimony on the bankruptcy judge in the hope of garnering a broad use immunity, for that would be *too high a price to pay for information useful in the administration of the estate.*" 587 F.2d at 120 (emphasis added). A fortiori, not every *former* officer should be able to gain immunity under the Bankruptcy Act. Yet, that result is the logical extension of the Second Circuit's expansion of Section 7b in this case.

In the instant case, the public interest against "wholesale immunity baths" and the interest of the individual Joseph Binder in preserving his Fifth Amendment right coincide; the public and private considerations are not competing. As expressed in both the *Bart* and *Grand Jury Investigation* cases:

> "Both interests counsel a strict construction of the immunity statute and suggest that it should be applied only after the necessity for doing so has been established." *In re Grand Jury Investigation* [*Frank*], 317 F. Supp. at 796.

In both the *Bart* and *Grand Jury Investigation* cases, as well as the *Vericker* case, the immunity statute under interpretation conferred full transactional immunity in exchange for the witness's right to assert his Fifth Amendment privilege. The need for strict construction of the instant immunity statute, Section 7 of the Bankruptcy Act,

is even greater since the witness herein will receive the lesser protection of use and derivative use immunity.

Thus, both the public interest and Mr. Binder's constitutional right will suffer if the improper expansion of Section 7b now endorsed by the Second Circuit is left undisturbed by this Court.* Any number of former officers—in particular, Mr. Binder—will suffer the loss of their Fifth Amendment right, and the danger will increase that such grants of immunity will be given "when the game would not be worth the candle." *In re Vericker,* 446 F.2d at 247 (footnote omitted).**

In the leading case of *In re Bush Terminal Co.,* 102 F.2d 471 (2d Cir. 1939), the Second Circuit implicitly set forth

---

* Effective October 1, 1979, the Bankruptcy Reform Act of 1978 will govern the examination of the debtor and witnesses. Under the new act, the debtor will no longer receive an automatic grant of immunity, thereby changing the present Section 7a(10) of the Bankruptcy Act. *See* 11 U.S.C.A. § 344 (1979). However, this change in the law should not affect the granting of the instant writ since the unlawful curtailment of one person's rights under the Fifth Amendment is of sufficient importance to warrant the Supreme Court's review of the matter. Moreover, Section 7b of the Bankruptcy Act, or an equivalent thereof, apparently does not appear in the new Bankruptcy Reform Act. Therefore, parties are referred to the Bankruptcy Rules presently in effect for the applicable procedure when the bankrupt or debtor is a corporation; the present rules remain in effect until the new bankruptcy rules are drafted. Present Rule 901(6), 11 U.S.C. App. Rule 901(6) (1976), supplements the statutory definition of a bankrupt and defines that term when the bankrupt is not a natural person. This rule, like Section 7b, does not mention former officers, directors or stockholders. Thus, an additional reason for this Court to interpret Section 7b is the need to determine the meaning of that section and Rule 901(6) for the future efficient and orderly administration of bankrupt estates.

** Judge Friendly noted in the *Vericker* case that Congress in passing the statute there at issue had intended to protect the government against prosecutors who too readily dispensed immunity. 446 F.2d at 247. In the instant case, as noted above, the practical result of the Second Circuit interpretation of Section 7b is that any number of former officers, directors, and stockholders of a debtor or bankrupt may be designated and given immunity.

a rule of strict construction. In holding that a former stockholder and director of the bankrupt corporation could not be required to testify under Section 7, the Second Circuit rejected the argument that references to categories of persons in subsection b of Section 7 include those persons who formerly held such positions. The court observed that when Congress intended to include such persons within a group described in the Bankruptcy Act, "appropriate words were used to make that plain." *Id.* at 471. Thus, the court referred to 11 U.S.C. § 558 (1976), which provides in pertinent part:

> "A person shall not be deemed disinterested, for the purposes of sections 556 and 557 of this title, if— . . . (3) he is, or *was within two years prior to the date of the filing of the petition, a director, officer, or employee of the debtor. . . .*" (emphasis added).

Any attempt to bring former officers, directors, or stockholders of the bankrupt or debtor within the scope of Section 7b directly counters the plain meaning of that statutory section, and, accordingly, Joseph Binder, a former officer, director, and stockholder, can not be properly designated.

The principle of statutory construction employed by the court in *Bush Terminal*—that "[w]hen the legislature has carefully employed a term in one section of a statute and has excluded it in another, it should not be implied where excluded" *—has often been utilized by this Court and other courts. *See, e.g., FTC* v. *Sun Oil Co.*, 371 U.S. 505, 512-16 (1963); *Bott* v. *American Hydrocarbon Corp.*, 458 F.2d 229, 232-33 (5th Cir. 1972). Both Section 7b, 11 U.S.C. § 25(b)(1976), and Section 158, 11 U.S.C. § 558

* Bott v. American Hydrocarbon Corp., 458 F.2d 229, 233 (5th Cir. 1972).

(1976), were passed in 1938 as part of the Chandler Act amendments to the Bankruptcy Act. Thus, since Congress expressly stated in Section 158 when it wanted to include classes of persons who *formerly* held designated positions, it is reasonable to conclude that like clarity of expression would be present in Section 7b if the categories of persons described therein were similarly intended to be broadly construed to include, as was found by the Second Circuit herein, those persons who formerly held such positions.* Moreover, the narrower interpretation of the statute is consonant with overall rationality, and effects a result compatible with individual constitutional rights and the demands of efficient bankruptcy administration.

In the instant case, not only did the court of appeals give short shrift to the important statutory construction and constitutional questions raised by this case, but also it failed to follow—indeed, even consider—the long-standing precedent of *Bush Terminal.* The court's decision is directly and irreconcilably in conflict with that case and constitutes a sub silentio overruling of it.

While *Bush Terminal* has stood as the law of the Second Circuit since 1939, the Supreme Court has never interpreted this important statutory section, and the instant case with its constitutional implications compels this Court to consider Section 7b. The only two cases cited by the court of appeals in support of its interpretation of Section 7b, *Greene* v. *Harris,* 240 F.2d 275 (2d Cir. 1957), and *United States* v. *Weissman,* 219 F.2d 837 (2d Cir. 1955), are clearly distinguishable from the present case. In both

* There is no relevant legislative history pertaining to Section 7b; accordingly, proper interpretation of the statute must rest principally on the language itself and the policy considerations for or against designation in a Chapter XI proceeding. As discussed herein, both the clear import of the statute and the practical operation of a debtor-in-possession in a Chapter XI proceeding militate against the designation of Binder.

cases, unique circumstances demanded that a narrow exception be carved into the *Bush Terminal* rule.

In *Greene,* a former "de facto president" was designated by the referee *at the start* of the bankruptcy proceeding to prepare the schedules and statement of affairs required of the bankrupt under Section 7 of the Bankruptcy Act. The court was concerned with preventing officers and fiduciaries of a bankrupt corporation from evading the "salutary purpose" of Section 7b "by the patent device of resignation just prior to bankruptcy." *Id.* at 276. The interpretation given Section 7b by the *Greene* court did not affect an individual's constitutional rights; the gloss placed on the words of Section 7b was for the purpose of ensuring the orderly and efficient administration of the bankrupt estate. Nor did the *Greene* case focus upon an examination pursuant to Section 7a and the immunity available under that section.

None of the considerations present in *Greene* are relevant to the instant case. In a Chapter XI proceeding, such as the Bohack proceeding, there are generally no mass resignations prior to the filing of the Chapter XI petition and no need to designate a controlling person under Section 7b since the debtor-in-possession continues to operate the company and both administers the debtor and performs the duties required of the debtor in Section 7. Indeed, in the Bohack proceeding, there were and are responsible individuals in control who have the information necessary to perform the duties of the bankrupt—and who have performed the duties of the bankrupt.

In *United States* v. *Weissman,* 219 F.2d 837 (2d Cir. 1955), the only other case cited by the Second Circuit in affirming the designation of Binder and the only other Second Circuit (or other circuit) case on Section 7b, Weissman was the only person financially interested in a network

of companies of which he was the sole owner. He had absolute control of the companies' conduct and was treated by the court "as though he was the sole shareholder in all." *Id.* at 838. Unlike Weissman, Binder was not—and certainly is not at the present—the single person who, in reality, was in control of the bankrupt corporation. Moreover, unlike Binder, who has been designated four and one-half years after the Bohack petition was filed, Weissman performed the essential duties of the bankrupt from the inception of the proceeding.

Further, in both the *Greene* and *Weissman* cases, the designation of the concerned party could not have been sought while the person was still an officer and director as in the instant case; the court had no choice but to designate a former officer or the like so that *someone* could be designated. In the instant case, not only did officers and directors other than Mr. Binder perform the duties of the debtor, but also the Creditors' Committee or the bankruptcy judge could have sought to designate Binder while he was still an officer and director. Thus, the plain import of Section 7 should not be ignored when the Creditors' Committee failed to examine Mr. Binder years ago and never raised the issue of designation until the district court raised the immunity issue sua sponte at the oral argument.

While *Greene* and *Weissman* carved narrow exceptions in the *Bush Terminal* rule, the instant court of appeals' decision overrules sub silentio *Bush Terminal.* Either deliberately or through inadvertence, the Second Circuit has redrafted Section 7b by judicial fiat. As a result of the court of appeals' decision, Section 7b has been given a radically different meaning without congressional action; immunity, a tool for gaining needed evidence which should be used only sparingly has been, and may well be in the future, conferred improperly; and an individual, Joseph Binder, has been denied his right to assert the Fifth

Amendment. Thus, there is a pressing need for this Court to interpret Section 7b and to exercise its power to prevent the endangerment of Joseph Binder's constitutional rights.

II.

The Failure to Permit the Bankruptcy Judge to Determine Whether Binder Should Be Designated as the Debtor Pursuant to Section 7b Was an Abuse of Discretion.

The history of this proceeding required particularly close scrutiny of the applicable statute and case law by the court of appeals. As discussed in the statement of the case, the district court, acting sua sponte, hastily and without briefing had decided that Binder should be given immunity. Even though the issue of immunity under Section 7a(10) was then briefed—with only two days for preparation—no careful consideration was ever given to the important issues concerning the construction of an immunity statute and the effect of such construction on Binder's Fifth Amendment rights. Indeed, the district court's decision recognized that its original view that Binder had immunity and was required to testify at the time of the August 9, 1977 and February 24, 1978 examinations was incorrect, since the witness had not been designated to perform the duties of the debtor pursuant to Section 7b. The district court thereupon directed the bankruptcy judge to designate Binder as the debtor, instead of deciding the appeals before it with respect to the prior rulings of the bankruptcy judge.

The bankruptcy court, the primary arm of bankruptcy administration, *never* suggested that Binder should be designated, *never* held hearings on the issue of the appropriateness of designating him and *never* will consider this

important issue. Thus, another reason the Supreme Court should exercise its powers in the instant case is to correct the wholly unauthorized invasion of the bankruptcy court's discretionary and supervisory power over the administration of bankruptcy matters.*

The district court's failure to allow the bankruptcy judge to consider in the first instance whether Binder should be designated as the debtor is an abuse of discretion and directly counter to the case law in the Second Circuit and other circuits. It has been held that the administration of a bankrupt estate is left largely to the bankruptcy judge (formerly known as a referee), whose acts in administrative matters should not be set aside unless he has committed a plain error of law or has abused his discretion. *In re Ira Haupt & Co.*, 379 F.2d 884 (2d Cir. 1967); *In re Rosenfeld-Goldman Co.*, 228 F. 921 (D. Mass. 1915). "In the orderly administration of justice all bankruptcy matters normally should be presented first to a referee in bankruptcy and issues of law and fact there determined." *In re Naftalin & Co.*, 315 F. Supp. 463, 465 (D. Minn. 1970). As was stated not many years ago by a district court in Missouri, "[t]he District Court is not a court of first impression for bankruptcy matters." *In re Gowen*, 328 F. Supp. 789, 791 (E.D. Mo. 1971).

In performing his functions, a bankruptcy judge is not unlike an administrative agency. Thus, in the instant case, the doctrine of primary jurisdiction, which is a time-honored precept of administrative law, provides a direct parallel. In primary jurisdiction cases, the court *must* reserve decision until the administrative agency has entertained the case and gathered the relevant facts. *See,*

---

* Although the new bankruptcy act changes the present relationship between the bankruptcy judge and the district judge and, indeed, changes the appeal procedure, the present court system remains in effect through March 31, 1984.

e.g., Ricci v. *Chicago Mercantile Exchange,* 409 U.S. 289, 304-08 (1973); *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U.S. 481, 496-99 (1958); *Far East Conference* v. *United States,* 342 U.S. 570, 574-76 (1952). As stated in *Far East Conference*:

> "The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter *should not be passed over.*" 342 U.S. at 574 (emphasis added).

This principle is directly applicable herein.

In recognition of the wisdom of utilizing a bankruptcy judge's expertise, it has been held that the district court, on an appeal from a decision of the bankruptcy court, should refrain from deciding issues not presented first to the bankruptcy court. *In re Fowler,* 407 F. Supp. 799 (W.D. Okla. 1975); *In re Unikraft Homes of Virginia, Inc.,* 370 F. Supp. 667 (W.D. Va. 1974); *In re Ira Haupt & Co.,* 287 F. Supp. 318 (S.D.N.Y.), *appeal dismissed per curiam,* 405 F.2d 493 (2d Cir. 1968); *In re Nassau Press, Inc.,* 259 F. Supp. 666 (E.D.N.Y.), *aff'd on other grounds per curiam,* 369 F.2d 700 (2d Cir. 1966). There are numerous reported cases wherein the district court sends a matter back to the bankruptcy judge so that the bankruptcy judge may either hold a hearing or make further findings with regard to a particular issue. *See, e.g., In re Wolman,* 459 F.2d 80 (4th Cir. 1972); *In re Gottfried Baking Co.,* 312 F. Supp. 643 (S.D.N.Y. 1970); *In re Elkins-Dell Mfg. Co.,* 253 F. Supp. 864 (E.D. Pa. 1966); *In re Shapiro,* 187 F. Supp. 298 (E.D.N.Y. 1958).

The court of appeals dealt with this important issue of the departure of the district court from proper judicial

administration in a cursory manner. In holding that the district court did not lack the authority to order the bankruptcy judge to designate Binder to perform the duties of the debtor under the Bankruptcy Act, the court cited no cases directly on point but referred to two cases, *In re Ostrer,* 318 F. Supp. 984, 988 (E.D.N.Y. 1970), and *In re Stirling Homex Corp.,* Nos. 78-5025, 78-5039, slip op. 371, 386 (2d Cir., Nov. 22, 1978), *affirmed as modified,* slip op. 1243 (2d Cir., Jan. 30, 1979). The *Ostrer* case is clearly inapposite and, indeed, supports the rule that the district court should not invade the bankruptcy court's discretionary authority. In *Ostrer,* the district court merely used the power vested in it by Section 2a(10) of the Bankruptcy Act, 11 U.S.C. 11(a)(10) (1976), to re-refer the case to the bankruptcy judge for a new consideration of the entire matter. The exercise of discretion in passing upon the discharge of the bankrupt was left to the person primarily responsible for the administration of the bankrupt estate—the bankruptcy judge.

In the lengthy *Stirling Homex* opinion, the court devotes one paragraph to the discretion issue. Citing no cases, the court directs the exercise of the bankruptcy court's discretion. This portion of the case is clearly wrong. The *Stirling Homex* language is particularly inexplicable in light of another very recent Second Circuit bankruptcy decision, *United States* v. *Coyne,* 587 F.2d 111 (2d Cir. 1978). In that decision, in a thorough consideration of Section 7a(10) and Section 7b of the Bankruptcy Act, the court repeatedly referred to the discretion of the bankruptcy judge to decide whether or not designation was appropriate in different situations. Indeed, the language of Section 7b, which refers to those individuals who "*may* be designated" (emphasis added), contemplates the exercise of discretion. Logically—and as required by law—that discretion should be exercised by the bankruptcy judge, since he is most

familiar with the facts and individuals of the particular bankruptcy or Chapter XI proceeding. Thus, in the *Coyne* case, it was the thrust of the court's opinion that the ***bankruptcy judges*** must "shape their procedures" to each situation wherein the grant of immunity under Section 7a(10) is under consideration.

It is essential that this Court formulate a definitive ruling on this critical issue of the proper exercise of the bankruptcy judge's discretion. The impact on proper judicial administration of the instant case necessitates the exercise of the Court's powers.

Conclusion

For all the reasons set forth above, it is respectfully requested that a writ of certiorari be granted.

April 3, 1979

Respectfully submitted,

JAY G. STRUM
425 Park Avenue
New York, New York 10022
(212) 759-8400

Counsel for Petitioner

Of Counsel:

KAREN E. KATZMAN
LOUIS J. MAGGIOTTO, JR.
P. GREGORY SCHWED
Kaye, Scholer, Fierman, Hays
& Handler
425 Park Avenue
New York, New York 10022
(212) 759-8400

APPENDIX

TABLE OF CONTENTS

PAGE

Opinion and Order of the Bankruptcy Judge, United States District Court for the Eastern District of New York, February 3, 1978 ..... 1a

Minutes of Hearing Before the Hon. Jacob Mishler, C.J., United States District Court for the Eastern District of New York, April 26, 1978 ..... 5a

Memorandum of Decision and Order of the United States District Court for the Eastern District of New York, May 12, 1978 ..... 9a

Judgment and Order of the United States Court of Appeals for the Second Circuit, January 10, 1979 .... 17a

Order Denying Motion to Stay Issuance of Mandate by United States Court of Appeals for the Second Circuit, February 13, 1979 ..... 19a

Letter from Clerk of Supreme Court of the United States with Respect to Denial of Stay, February 23, 1979 ..... 20a

Constitutional Provision, Statutes and Rule Involved .. 21a

Opinion and Order of the Bankruptcy Judge, United States District Court for the Eastern District of New York, February 3, 1978

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Bankruptcy No. 74-B-933

February 3, 1978

In the Matter of

THE BOHACK CORPORATION,

Debtor.

OPINION AND ORDER

PARENTE, *Bankruptcy Judge*

The issue presented pertains to whether the former President of The Bohack Corporation, debtor-in-possession, may refuse to answer questions posed by the Creditors' Committee in a Rule 205(a), Rules of Bankruptcy Procedure, examination premised upon a claim of privilege under the Fifth Amendment of the United States Constitution.

On August 9, 1977, pursuant to a subpoena, Joseph Binder (hereafter 'Binder') appeared in this Court and was called to the witness stand. In response to questions from counsel for the Creditors' Committee, Binder stated his name and address. The next question put to Binder asked whether he had ever been the President of The Bohack Corporation. Upon advice of counsel, Binder asserted his rights under the Fifth Amendment and declined to answer the question.

Opinion and Order of the Bankruptcy Judge, United States District Court for the Eastern District of New York, February 3, 1978

The substance of Binder's contention embraces the concept that a response to the question albeit not per se incriminating could nevertheless furnish a link in the chain of evidence which might tend to incriminate him.

It is relevant to note that the Securities & Exchange Commission is conducting an investigation to ascertain if there have been violations of Federal Securities Laws with reference to the preparation and dissemination of certain financial statements of The Bohack Corporation. Binder is one of a number of former Bohack employees interrogated by the Securities & Exchange Commission; however, the Court has no knowledge of any criminal pursuit or indictment in the offing against Binder.

The thrust of the Creditors' Committee's posture espouses its fundamental right to question a former officer of a debtor or debtor-in-possession on matters within the scope of Rule 205(a), Rules of Bankruptcy Procedure. Adjunctively, the Creditors' Committee characterizes Binder's refusal to answer the question as a blanket invocation of the Fifth Amendment privilege patently premature and unjustified under the prevailing circumstances of the subject examination.

Protection against testimonial compulsion provided by the Fifth Amendment privilege of the United States Constitution once invoked must be accorded a liberal construction . . . . In Re *Hoffman* v. *United States,* 341 U.S. 479 (1951).

The phrase "liberal construction" conveys a meaningful dictate of personal privilege ingrained under our system of law. It does not, however, in my opinion, sanction refusal by a witness appearing pursuant to §21a, as adapted

Opinion and Order of the Bankruptcy Judge, United States District Court for the Eastern District of New York, February 3, 1978

by Rule 205(a), to answer a question clearly prefatory and innocuous.

In apposite context, the courts have uniformly held that a naked assertion of the Fifth Amendment privilege by a witness, absent a justifiable basis that the answer may furnish evidence of a fact which would be the one link wanting in a chain of proof against him of a crime, does not fall within the purview of the privilege . . . . In Re *Autocue Sales and Distributing Corporation,* 151 F.Supp. 798 (S.D.N.Y. 1957); *Freeman* v. *Seligson,* 405 F.2d 1326, 1333 (D.C. Cir. 1968); and *Paramount Publix Corp.,* 82 F.2d 230, 233 (2nd Cir. 1936).

The Bohack Corporation commenced this proceeding in accord with the provisions of the Bankruptcy Act endeavoring to rehabilitate its financially distressed posture. Binder was the President of The Bohack Corporation when the petition was filed on July 30, 1974 and served in such capacity through the Spring of 1976. Binder's testimony relative to the affairs of the corporation is held to be absolutely essential by the Creditors' Committee.

Congress in enacting §21a of the Bankruptcy Act did so in contemplation of allowing and providing means for a thorough examination of the affairs of a corporate debtor. The intent of Congress was reenforced by the passage of Rule 205 and Rule 11-26, Rules of Bankruptcy Procedure, promulgated within the past five years.

The question put to Binder; viz., "Were you the President of The Bohack Corporation?" is patently a matter of public record—purely foundational in nature and lacking in any incriminatory visibility. Binder's contention that the answer to the question could itself tend to incriminate him

Opinion and Order of the Bankruptcy Judge, United States District Court for the Eastern District of New York, February 3, 1978

or provide a link in a chain of evidence is found to be premature, remote and clearly conjectural.

Accordingly, it is the finding of this Court that the invocation of the privilege by the witness herein is improper. The question appears innocent on its face and Binder has made no showing that his answer might tend to incriminate; i.e., that there is reasonable likelihood of danger to him . . . In Re *American Cyanamid Co.* v. *Sharff*, 309 F.2d 790 (3rd Cir. 1962).

It is within the Court's province to ultimately decide whether Binder's silence is justified. Should the Court adopt the position advanced by Binder and exonerate him from answering the question, it would constitute an *in vacuo* abandonment and forfeiture of its judicial function thereby approving an incipient blanket invocation of the Fifth Amendment privilege.

Based upon the implication of the question, the setting in which it is asked, and the circumstances of this proceeding, Binder's refusal is unjustifiable.

It is ordered that Binder appear in this Court on February 16, 1978 at 9:30 A.M. to give answer to the question and resume the examination.

/s/ C. Albert Parente
C. Albert Parente
Bankruptcy Judge

Dated: February 3, 1978
Westbury, N.Y.

Minutes of Hearing Before the Hon. Jacob Mishler, C.J., United States District Court for the Eastern District of New York, April 26, 1978

UNITED STATES DISTRICT COURT

Eastern District of New York

78-Civ.-727 (74-B-933)

April 26, 1978

In the Matter of

The Bohack Corporation,

Debtor.

---

[3] The Clerk: In the Matter of the Bohack Corporation.

The Court: I would like to hear from the attorney for the witness, Mr. Binder.

Did you serve your brief on the other side?

Mr. Strum: Yes, sir.

The Court: Maybe there is something I missed.

Section 7810 of the Bankruptcy Act appears to give complete immunity to any witness testifying in a 28 Proceeding. Why are you different?

Mr. Strum: It is my understanding that that immunity may be use immunity but may not be transaction immunity and that it would not afford the witness the complete immunity he would receive if he asserts his rights under the Fifth Amendment.

I have not briefed the subject. I would be happy to do so.

The Court: It is the only issue before me, really. I see no other issue. I don't know why privilege even came into it.

Minutes of Hearing Before the Hon. Jacob Mishler, C.J., United States District Court for the Eastern District of New York, April 26, 1978

MR. STRUM: I'd be delighted to brief that issue, your Honor.

THE COURT: The very purpose of the statute was so that these claims could not be raised.

MR. STRUM: Counsel for the Creditors' [4] Committee has not made that assertion—

THE COURT: That is the only point I am interested in.

MR. STRUM: Then please permit me to brief that subject. I don't think that section requires the witness to testify and I'd be glad to submit a brief on that point.

THE COURT: Well, in Castigar against the United States the Supreme Court rejected the idea that the Fifth Amendment requires full transactional immunity. I don't have to go any further.

The trustee can brief it too. How long do you want?

MR. STRUM: I think two weeks would be sufficient.

THE COURT: Oh, of course it would be. I put it on today because we are not going to delay the Bohack Bankruptcy by long delays. You can research this in 24 hours.

MR. STRUM: The reason it has not been briefed before is because the issue was not raised by anybody heretofore.

THE COURT: Have your brief in Friday by 4 o'clock. I am not going to spend a lot of time on this unless you are going to tell me something I [5] have not heard before.

You say the statute does not give you transactional immunity so you can still assert the privilege. Narrow issue.

MR. STRUM: I'd like to look at the cases on that, your Honor.

THE COURT: Start with Castigar.

MR. STRUM: All right.

Minutes of Hearing Before the Hon. Jacob Mishler, C.J., United States District Court for the Eastern District of New York, April 26, 1978

THE COURT: Castigar against the United States, 406, U.S. 44, 192, Supreme Court, 1653, 1972 decision.

You might also look at U.S. against Dorneau, 491 F.2nd, 473, Second Circuit case, 1974.

The statute immunizes you against prosecution in the manner in which the Supreme Court says you are immunized. Then you have no right to withhold testimony. If it does not you may very well have the right to withhold it.

Incidentally, was Mr. Binder ever President of Bohack?

MR. STRUM: That was the first question.

THE COURT: Does that tend to incriminate?

MR. STRUM: I don't think it tends to incriminate, but whether the answer, if given, would provide a link [6] in the chain of evidence—

THE COURT: That is what we mean by "Tends to incriminate."

MR. STRUM: As I understand the Supreme Court and the Second Circuit the test is, can it be clearly stated that the answer, if given, would not tend to incriminate?

THE COURT: And you will find cases that say, we are trying to reason this in a total vacuum. We cannot decide this unless we hear how it tends to incriminate.

You refer to some kind of S.E.C. investigation that might charge Mr. Binder with a violation of the Securities and Exchange Act—

MR. STRUM: I refer to several other things; a conversation I had with the U.S. Attoreny who told me he is conducting an investigation and is contemplating presenting evidence to the Grand Jury and that Mr. Binder is a target of that investigation.

THE COURT: Well, I have had defendants before me and

Minutes of Hearing Before the Hon. Jacob Mishler, C.J., United States District Court for the Eastern District of New York, April 26, 1978

witnesses before me who refused to testify on the grounds that they received only use immunity and I have directed them to answer and when they [7] failed, I held them in contempt of court and thus far I have not been reversed yet.

Maybe you have something I don't know about, but I will give you until Friday at 4 P.M. to show me.

MR. STRUM: I will have my brief here by Friday at 4 P.M.

THE COURT: I invite the trustees to submit a brief also.

Memorandum of Decision and Order of the United States District Court for the Eastern District of New York, May 12, 1978

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

78-Civ.-727 (74-B-933)

May 12, 1978

In the Matter of

THE BOHACK CORPORATION,

Debtor.

MEMORANDUM OF DECISION AND ORDER

MISHLER, *Chief Judge*

The Creditors' Committee (the "Committee") of the Bohack Corporation ("Bohack") and Joseph Binder, a former officer of Bohack, appeal from the orders of Bankruptcy Judge Albert Parente entered on February 3 and February 24, 1978.

On July 30, 1974, Bohack filed a petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act, 11 U.S.C. §701 *et seq.* Thereafter, a plan of arrangement was formulated by Bohack, and the Committee is currently conducting an investigation of the debtor's financial condition to assist the court in determining whether the proposed plan is feasible and in the best interest of the creditors. In connection with this investigation, several of Bohack's employees have been examined by counsel for the Committee.

Memorandum of Decision and Order of the United States District Court for the Eastern District of New York, May 12, 1978

Upon application of the Committee, the bankruptcy court ordered the examination of Joseph Binder pursuant to Section 21a of the Bankruptcy Act, 11 U.S.C. §44(a).[1] Binder was the President of Bohack when the petition was filed and served in that capacity through the spring of 1976. On August 9, 1977, Binder appeared for examination; when asked by counsel for the Committee whether he was President of Bohack, he refused to respond, asserting his Fifth Amendment privilege against self-incrimination. By opinion and order dated February 3, 1978, Judge Parente ordered Binder to answer the propounded question, finding that the response could not possibly tend to incriminate him. The examination resumed on February 24, 1978. Once again, Binder declined on Fifth Amendment grounds to answer this question, along with a series of other questions posed by counsel for the Committee. Judge Parente sustained the witness's refusal to answer thirty-five questions; with respect to the remaining twenty-five, he ordered the witness to respond on the basis that the demanded information would not tend to incriminate him.

Both parties now appeal from these orders. The Committee appeals from the February 24th rulings which sustained Binder's assertions of the constitutional privilege. Binder appeals from both the February 3rd order and the February 24th rulings which rejected his claims of self-incrimination. In support of his refusal to testify, Binder

[1] This section provides in relevant part:

> The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt . . . to appear before the court . . . to be examined concerning the acts, conduct or property of a bankrupt. . . .

Memorandum of Decision and Order of the United States District Court for the Eastern District of New York, May 12, 1978

argues that he is the target of criminal investigations presently conducted by the SEC and the United States Attorney's office for the Eastern District of New York, and that disclosure of the information sought by the Committee would furnish evidence that might be used against him in these criminal proceedings. The Committee's position is that Binder should be designated to perform the duties of the debtor pursuant to Section 7b of the Bankruptcy Act, 11 U.S.C. §25(b), and thereby granted the immunity of Section 7a(10) of the Act, 11 U.S.C. §25(a)(10). Since the immunity afforded by the latter provision is coextensive with the scope of the privilege, *U.S.* v. *Dorneau*, 491 F.2d 473, 480 (2d Cir. 1974), Binder may no longer refuse to testify on Fifth Amendment grounds.

DISCUSSION

We agree with the Committee that Binder should be designated under Section 7b to perform the duties of the debtor and thereby compelled to testify under the protective immunity of Section 7a(10). This procedure is fully consonant with, and would best implement, the Congressional policy which underlies the statutory grant of immunities to bankrupts: to encourage a full disclosure of the affairs of the debtor and thereby insure a proper administration of the estate, whether the goal be distribution or, as in the instant proceedings, rehabilitation.[2]

[2] To encourage complete disclosure by the bankrupt of his affairs, Congress broadened the scope of immunity granted by Section 7a(10) in 1970 (§207 of the Organized Crime Control Act of 1970) to include "any evidence that is directly or indirectly derived from such testimony." Thus, the immunity now bars, *in*

Memorandum of Decision and Order of the United States District Court for the Eastern District of New York, May 12, 1978

Section 7a of the Act, 11 U.S.C. §25(a), outlines the duties of a bankrupt; relevant to this appeal is the obligation imposed by subdivision (10), which provides in pertinent part:

> The bankrupt shall at the first meeting of his creditors . . . *and at such other times as the court shall order,* submit to an examination concerning the conducting of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabout of his property, and, in addition, all matters which may affect the administration and settlement of his estate. . . ; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding. . . . (emphasis added).

Where the bankrupt is a corporation, "its officers, . . . directors, . . . stockholders, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt," Section 7b, 11 U.S.C. §25(b). These duties include the obligation to submit to examinations ordered pursuant to section 7a(10), and, like the individual bankrupt, the corporate representative is entitled to the

---

toto, use of the Fifth Amendment privilege. As stated in the House Report, Congress intended by the Amendment to achieve "effective displacement of the privilege against self-incrimination by granting protection coextensive with the privilege" in order to enable bankruptcy courts for the first time to compel the testimony of witnesses who refuse to testify on Fifth Amendment grounds. H.Rep. No. 1549 on S.30, 91st Cong., 2d Sess. 32-33 (1970), *reprinted in* 1970 U.S. Code Cong. & Adm. News 4008; *see also U.S.* v. *Dorneau, supra* at 480.

Memorandum of Decision and Order of the United States District Court for the Eastern District of New York, May 12, 1978

immunity granted by that section. *U.S.* v. *Castellana,* 349 F.2d 264, 273-4 (2d Cir. 1965); *U.S.* v. *Weissman,* 219 F.2d 837, 841 (2d Cir. 1955).

The fact that Binder is a former officer of Bohack does not render him ineligible for designation under 7b. Rather, the significant point is that Binder served in that position of authority during the period under investigation. One of the major objectives of the Committee's examination was to determine why Bohack suffered massive inventory losses between 1974 and 1975; as a fiduciary of the debtor during these critical years, Binder would obviously have valuable information with respect to this inquiry. Examinations of a bankrupt's affairs will ordinarily concern transactions that occurred prior to the filing of the petition, *see* 1A Collier on Bankruptcy 1016 (4th ed. 1976), and thus where the bankrupt is a corporation, only *former* officers and directors would have the direct knowledge sought by a 7a(10) examination. This observation was recently made in *THC Financial Corp.,* 4 B.C.D. 33 (D.C. Hawaii 1978), where the court in a Chapter X reorganization proceeding granted a trustee's application to designate a former officer and director to perform the duties of the debtor pursuant to 7b:

> The purpose of these provisions is to find out what occurred to bring the corporation into a bankruptcy condition. If former directors and officers may not be required to testify for the corporation there would almost certainly be large gaps in the information gathered. Where a Chapter X trustee has been appointed there normally will in fact be *no* officers and

> directors still serving as such, they will *all* be "former." If such "former" fiduciaries could not be required to testify, the provisions in question would be rendered nugatory at the very moment when Congress must have intended that they apply in strictest fashion. Such a result is absurd; therefore such an interpretation cannot be correct. Bankruptcy law will not be given to so limiting a construction as to permit evasion of its purpose. *Id.* at 34.

See also Greene v. *Harris,* 240 F.2d 275 (2d Cir. 1957) (de facto president who resigned his office two weeks prior to corporation's bankruptcy was ordered to perform the duties of the bankrupt); *In re Bell Refrigeration Corp.,* 169 F.Supp. 62 (N.D. Ohio 1958) (former officer who held his position when Chapter XI petition was filed must submit to examination in hearing upon creditors' objections to confirmation of the plan of arrangement); *In re Totem Lodge and Country Club,* 134 F.Supp. 158 (S.D.N.Y. 1955) (former officer and director and sole stockholder when the corporation was adjudicated bankrupt held to be eligible for designation under 7b).[3]

[3] Were it not for *U.S.* v. *Castellana,* supra, which this court is bound to follow, we would order Binder to testify under the immunity of 7a(10) notwithstanding the fact that he has not been formally designated to perform the duties of the bankrupt under 7b. However, the majority in *Castellana* held that the Section 7a(10) grant of immunity applies "only if the director or shareholder is specifically designated to perform the bankrupt's duties" and that "[a] meaningful distinction . . . should be drawn between the corporate officer who testifies voluntarily and thus cannot claim the privilege, and the one who, having been *directed* to appear by the bankruptcy court, has thereby been 'designated by the court to perform the duties imposed upon the bankrupt by this title.'" *Id.* at 273-74. We agree with Judge Hays who, in his dissent, suggested that the privilege should not depend on the "technical concept" of designation, since the purpose of 7a(10) is to encourage officers, directors and stockholders to testify freely and fully as to pre-bankruptcy corporate activities.

Finally, once designated to perform the duties of the debtor under 7b, Binder will be entitled to the immunity provided by 7a(10) notwithstanding the fact that his examination was ordered pursuant to Section 21a of the Act, 11 U.S.C. §44(a). As stated by Collier:

> It seems clear that the bankrupt, where he is compelled to testify on examination under §21a, should be accorded the same protection as to the use of his testimony that is given him under §7a(10) . . . [a]s stated previously, §7a(10) read together with §21a, gives the court the necessary power to order an examination of the bankrupt at any time. There is no good reason for differentiating between the examination of a bankrupt under §21a and his examination . . . under §7a(10). 2 Collier on Bankruptcy 315-16 (14th ed. 1976).

And in *Goldberg* v. *Weiner,* 480 F.2d 1067, 1070 (9th Cir. 1973), the bankrupt refused to answer questions on Fifth Amendment grounds at an examination ordered under Section 21a. On appeal, the bankrupt argued that the immunity granted by Section 7a(10) did not apply to testimony given at a 21a examination. The Court of Appeals rejected this contention, and, quoting the language of 7a(10), held that "[w]e see no reason why such an examination [21a] does not fall within the class of examina-

Memorandum of Decision and Order of the United States District Court for the Eastern District of New York, May 12, 1978

tions held 'at such other times as the court shall order,' referred to in Section 7a(10)." *Accord, U.S.* v. *Weissman, supra* at 841.[4]

The proceeding is remanded to Bankruptcy Judge Parente. Judge Parente is directed to designate Binder to perform the duties of the debtor under Section 7b of the Act, 11 U.S.C. §25(b). Once designated, Binder is ordered to answer the questions propounded at the August 9th and February 24th examinations, and it is

So Ordered.

/s/ Jacob Mishler
U. S. D. J.

[4] The correlation between Sections 21a and 7a(10) is best illustrated by Bankruptcy Procedure Rule 205. Subdivision (d) of that rule defines the scope of all examinations ordered under the Act. Thus, whether the witness be a third party, or the bankrupt himself, the examination may relate only to "the acts conduct or property of the bankrupt, or to any matter which may affect the administration of the bankrupt's estate. . . ." *See* Advisory Committee's Note, Rules Bankr. Proc. Rule 205, 11 U.S.C.

Judgment and Order of the United States Court of Appeals for the Second Circuit, January 10, 1979

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 78-5035

In the Matter of

The Bohack Corporation,

Debtor.

Joseph Binder, a witness,

Appellant,

v.

Official Creditors' Committee,

Appellee.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of January one thousand nine hundred and seventy-nine.

Present:

Honorable Irving R. Kaufman,

Chief Judge.

Honorable J. Joseph Smith,
Honorable James L. Oakes,

Circuit Judges.

Judgment and Order of the United States Court of Appeals for the Second Circuit, January 10, 1979

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

1. Judge Mishler did not lack authority to order the Bankruptcy Judge to designate Binder to perform the duties of the debtor under the Bankruptcy Act. *See In re Osterer*, 318 F. Supp. 984, 988 (E.D.N.Y. 1970). *Cf. In re Stirling Homex Corp.*, No. 78-5205, slip op. at 386 (2d Cir. November 22, 1978).

2. Since Binder was President of Bohack during the period relevant to the Creditors Committee's investigation, and remained an officer for two years after the Chapter XI petition was filed, it was proper to designate him under Section 7 of the Act, despite the fact that he was no longer an officer of the corporation at the time of Judge Mishler's decision. *See Green* v. *Harris*, 240 F.2d 275 (2d Cir. 1957); *United States* v. *Weisman*, 219 F.2d 837, 841 (2d Cir. 1955).

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN, *Chief Judge.*

/s/ J. JOSEPH SMITH
J. JOSEPH SMITH

/s/ JAMES L. OAKES
JAMES L. OAKES, *Circuit Judges.*

Order Denying Motion to Stay Issuance of Mandate by United States Court of Appeals for the Second Circuit, February 13, 1979

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 78-5035

In re:
THE BOHACK CORPORATION,
Debtor.

JOSEPH BINDER,
Appellant,
v.
CREDITORS' COMMITTEE, BOHACK CORP.,
Appellee.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of February, one thousand nine hundred and seventy-nine.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated January 25, 1979 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) FRAP be and it hereby is denied.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN, *Chief Judge*

/s/ J. JOSEPH SMITH (per IRK)
J. JOSEPH SMITH

Judge Oakes voted to grant the motion.

Letter from Clerk of Supreme Court of the United States with Respect to Denial of Stay, February 23, 1979

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 23, 1979

Karen E. Katzman, Esq.
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, New York 10022

RE: Joseph Binder v. Official
Creditors' Committee, A-741

Dear Ms. Katzman:

Your application for stay in the above-entitled case was presented to Mr. Justice Marshall, who has endorsed thereon the following:

"Application Denied
Thurgood Marshall
2/22/79".

Very truly yours,

MICHAEL RODAK, JR., *Clerk*
By /s/ PATRICIA A. DEAN
Patricia A. Dean
Assistant

lef

cc: Morton L. Gitter, Esq.
Otterbourg, Steindler, Houston,
and Rosen, P.C.
230 Park Avenue
New York, New York 10017

Constitutional Provision, Statutes and Rule Involved

United States Constitution
Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Bankruptcy Act
Sec. 7, 11 U.S.C. § 25 (1976)

(a) The bankrupt shall (1) attend at the first meeting of his creditors, at the hearing upon objections, if any, to his application for a discharge and at such other times as the court shall order; (2) comply with all lawful orders of the court; (3) examine and report to his trustee concerning the correctness of all proofs of claim filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute and deliver to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt by his creditors or other persons to evade the provisions of this title coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary

bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their residences or places of business, if known, or if unknown that fact to be stated, the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated or disputed; and a claim for such exemptions as he may be entitled to; all in triplicate, one copy for the clerk, one for the referee, and one for the trustee: *Provided, however,* That the court may for cause shown grant further time for the filing of such schedules if, with his petition in a voluntary proceeding or with his application to have such time extended in an involuntary proceeding, the bankrupt files a list of all such creditors and their addresses; (9) file in triplicate with the court at least five days prior to the first meeting of his creditors a statement of his affairs in such form as may be prescribed by the Supreme Court; (10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge: *Provided, however,* That when the bankrupt is required to at-

tend for examination, except at the first meeting and at the hearing upon objections, if any, to his discharge, he shall be paid actual and necessary traveling expenses for any distance in excess of one hundred miles from his place of residence at the date of bankruptcy: *And provided further,* That the court may for cause shown, and upon such terms and conditions as the court may impose, permit the bankrupt to be examined at such place as the court may direct whether within or without the district in which the proceedings are pending; and (11) when required by the court, prepare, verify, and file with the court in duplicate a detailed inventory, showing the cost to him of his merchandise or of such other property as may be designated, as of the date of his bankruptcy.

(b) Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this title.

Bankruptcy Act
Sec. 21(a), 11 U.S.C. § 44(a) (1976)

(a) The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court or before the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt: *Provided,* That the spouse may be examined only touching business transacted by such spouse or to which such spouse is a party and to determine the fact whether such spouse has transacted or been a party to any business of the bankrupt: *And provided further,* That

the spouse may be so examined, any law of the United States or of any State to the contrary notwithstanding.

Bankruptcy Act
Sec. 302, 11 U.S.C. § 702 (1976)

The provisions of chapters 1 to 7 of this title shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors", and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 722 of this title, and the date of adjudication shall be taken to be the date of the filing of the petition under section 721 or 722 of this title except where an adjudication had previously been entered.

Bankruptcy Act
Rule 205, Examination, 11 U.S.C. app. Rule 205 (1976)

(a) Examination on Application

Upon application of any party in interest, the court may order the examination of any person. The application shall be in writing unless made during a hearing or examination or unless a local rule otherwise provides.

(b) Examination of Bankrupt at First Meeting

At the first meeting of creditors, the court shall publicly examine the bankrupt or cause him to be examined and may permit any party in interest to examine the bankrupt.

(c) Bankruptcy Judge to Preside

The bankruptcy judge shall preside at any examination under subdivision (b) of this rule.

(d) Scope of Examination

The examination under subdivisions (a) and (b) of this rule may relate only to the acts, conduct, or property of the bankrupt, or to any matter which may affect the administration of the bankrupt's estate, or to his right to discharge. The examination of a spouse under subdivisions (a) and (b) of this rule shall be subject to the provisos of § 21a of the Act.

(e) Compelling Attendance for Examination and Production of Documentary Evidence

The attendance of any person for examination and the production of documentary evidence may be compelled in accordance with the provisions of Rule 916 by the use of a subpoena for a hearing or trial.

(f) Place of Examination of Bankrupt

Without issuing a subpoena, the court may for cause shown and on such terms as it may impose order the bankrupt to be examined under subdivision (a) of this rule at any place it designates, whether within or without the district wherein the case is pending.

(g) Mileage

A person other than a bankrupt shall not be required to attend as a witness before a bankruptcy judge unless his lawful mileage and fee for one day's attendance shall be first tendered to him. If the bankrupt resides over 100

miles from the place of examination when he is required to appear for an examination under subdivision (a) of this rule, he shall be tendered mileage allowed by law to a witness for any distance over 100 miles from his residence at the date of bankruptcy or his residence at the time he is required to appear for such examination, whichever is the lesser.